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The Continental Insurance Company

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

15 THE CONTINENTAL INSURANCE
COMPANY,

Case No.: C-08-2052-SC

Related to Case No:
07-CV-05926-SC
07-CV-06045-SC
07-CV-05800-SC
08-CV-02268-SC

Plaintiff,

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VS.

18 JOHN JOSEPH COTA; REGAL STONE
19 LIMITED; FLEET MANAGEMENT LTD.;
20 and the M/V COSCO BUSAN, LR/IMO Ship
No. 9231743 her engines, apparel, electronics,
tackle, boats, appurtenances, etc., *in rem*,

**THE CONTINENTAL INSURANCE
COMPANY'S NOTICE OF DISMISSAL
OF COMPLAINT AS TO DEFENDANT
JOHN JOSEPH COTA (ONLY),
WITHOUT PREJUDICE**

22 Defendants

(FRCP 41(a)(1)(A)(i) – No Court Order Required)

24 | AND RELATED CROSS-ACTIONS

NOTICE OF DISMISSAL

WHEREAS, defendant John Joseph Cota (“Cota”) has invoked and declined to waive the arbitration clause in the insurance contract between plaintiff The Continental Insurance Company (“Continental”) and Cota;

WHEREAS, Continental acknowledges Cota's right to arbitration of at least one of the causes of action asserted by Continental against Cota in Continental's First Amended Complaint;

WHEREAS, Continental desires to proceed expeditiously to arbitration;

WHEREAS, Fed. R. Civ. P. 41(a)(1)(A) provides that a plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment;

WHEREAS, in an action involving multiple defendants, Fed. R. Civ. P. 41(a)(1)(A) allows a plaintiff to dismiss the action as against one defendant without dismissing the other defendants (*Pedrina v. Chun*, 987 F.2d 608, 609 (9th Cir. 1993));

WHEREAS, Cota has not served an answer to Continental's original Complaint nor to
Continental's First Amended Complaint;

WHEREAS, defendant Cota has not served a motion for summary judgment; and

WHEREAS, defendant Cota's pending motion to compel arbitration and stay proceedings is not the "functional equivalent" of an answer or motion for summary judgment and does not eliminate Continental's absolute right under Fed. R. Civ. P. 41(a)(1)(A) to file a voluntary notice of dismissal (*Hamilton v. Shearson Lehman American Express, Inc.*, 813 F.2d 1532, 1535 (9th Cir. 1987));

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Continental hereby dismisses its First Amended Complaint as against Cota and only Cota. This dismissal is without prejudice.

This dismissal does not extend to any other defendant or to any cause of action against any other defendant. Specifically, this dismissal does not extend to Regal Stone, Ltd., Fleet Management, Ltd., or the *M/V Cosco Busan*.

This dismissal of Cota is filed on behalf of Continental only and concerns only to
Continental's complaint and Cota's status as a defendant thereto. Cota is also named as a cross-
defendant to several cross-claims filed by his co-defendant Regal Stone. Continental does not
purport to be dismissing Cota as a cross-defendant to Regal Stone's cross-claims.

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DATED: August 15, 2008

BULLIVANT Houser Bailey PC

By Samuel H. Ruby
Kevin K. Ho

Attorneys for Plaintiff and Counterdefendant
The Continental Insurance Company

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